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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 58

LEE YOU FEE, by LEE Q. PON, his next friend,
Petitioner

v.

JOHN FOSTER DULLES, as Secretary of State

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a judgment of the District Court for the Eastern District of Wisconsin, dismissing petitioner's declaratory judgment action to establish his American citizenship.

Opinions Below

The opinion of the District Court is reported at 133 F. Supp. 160 and is set forth at page 12 of the Appendix herein. The opinion of the Court of Appeals is reported at 236 F. 2d 885 and is set forth at page 17 of the Appendix.

Jurisdiction

The judgment of the Court of Appeals was entered on September 26, 1956. The jurisdiction of the Court is invoked under 28 USC 1254(1).

Questions Presented

1. Whether American citizenship acquired abroad at birth pursuant to Congressional enactment (8 U.S.C. 601-g) may be declared forfeit because a sixteen year old child born abroad on July 16, 1935, finds himself unable to return to the United States as a result of factors beyond his control.

2. Whether involuntary foreign residence prevents expatriation of naturalized citizens but not of citizens at birth.

3. Whether Congress may grant citizenship at birth to a child born abroad to an American citizen father and impose arbitrary conditions upon such citizenship (i.e.) that regardless of factors beyond such child's control, he must come to the United States prior to his sixteenth birthday.

4. Whether the requirement for establishment of residence in the United States prior to a person's sixteenth birthday was tolled for five years during World War II by reason of war conditions, lack of transportation, absence of an American Consulate in Hong Kong, and other factors which made it impossible to come to the United States during such period of time.

5. Whether the Immigration Act of 1952, 8 U.S.C. 1401(b) and (c), which now permits retention of American citizenship by those born abroad provided they come here prior to their twenty-third birthday and which expressly applies to those born subsequent to May 24, 1934, applies to petitioner or whether the savings clause (8 U.S.C. 1101 note) prevents the application of such age extension.

Statutes Involved

Section 201 of the Nationality Act of 1940 (54 Stat. 1138; 8 U.S.C. 601) provided in pertinent part for American citizenship for the following:

> "(g) A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years' residence in the United States or one of its outlying possessions, at least five years of which were after attaining the age of sixteen years, the other being an alien: *Provided*, That, in order to retain such citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years; *Provided Further*, That, if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease."
>
> "(h) The foregoing provisions of subsection (g) concerning *retention of citizenship* shall apply to a child born abroad subsequent to May 24, 1934. Oct. 14, 1940, c. 876, Title I, Subchap. II, Sec. 201, 54 Stat. 1128."

(The foregoing sections were repealed by Section 403(a) of the Immigration and Nationality Act of 1952; 66 Stat. 279).

Section 301 of the Immigration and Nationality Act of

1952 (66 Stat. 235, 8 U.S.C. 1401) provides in pertinent part as follows:

"(a) The following shall be nationals and citizens of the United States at birth:

* * * * * * *

(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: *Provided*, That any periods of honorable service in the Armed Forces of the United States by such citizen parent may be included in computing the physical presence requirements of this paragraph.

(b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a), shall lose his nationality and citizenship unless he shall come to the United States *prior to attaining the age of twenty-three years* and shall immediately following any such coming be continuously physically present in the United States for at least five years: Provided, That such physical presence follows the attainment of the age of fourten years and precedes the age of twenty-eight years.

(c) Subsection (b) shall apply to a person born abroad subsequent to May 24, 1934: *Provided, however*, That nothing contained in this subsection shall be construed to alter or affect the citizenship of any person born abroad subsequent to May 24, 1934, who, prior to the effective date of this Act has taken up a residence

in the United States before attaining the age of sixteen years, and thereafter, whether before or after the effective date of this Act, complies or shall comply with the residence requirements for retention of citizenship specified in subsections (g) and (h) of section 201 of the Nationality Act of 1940, as amended."

Section 405(c) of the Immigration and Nationality Act of 1952 (66 Stat. 280; 8 U.S.C. 1101 note) provides:

"(c) Except as otherwise specifically provided in this Act, the repeal of any statute by this Act shall not terminate nationality heretofore lawfully acquired nor restore nationality heretofore lost under any law of the United States or any treaty to which the United States may have been a party."

Statement

Petitioner was born in China on July 16, 1935, of an American citizen father. His mother, a Chinese citizen, died in 1945, and he was then entrusted to the care of relatives in Hong Kong. His father, his two sisters and a brother, who are American citizens, all reside in the United States (R. 20-25).

Petitioner reached his sixteenth birthday on July 16, 1951. He applied for an American passport in Hong Kong together with his brother and sisters several months later. In December of 1951 passports were issued to all but petitioner. His application was denied upon the ground that he had passed his sixteenth birthday and had failed to establish residence in the United States pursuant to 8 U.S.C. 601(g). (R. 21-24.)

In August, 1952, this suit was instituted for a declaratory judgment of citizenship pursuant to 8 U.S.C. 903. Petitioner asserted that his failure to take up American residence

prior to his sixteenth birthday was occasioned by lack of finances (R. 50) and his immaturity, as well as his lack of knowledge of such requirement. He also asserted that the statutory provisions should be tolled for the five-year period of World War II when consular facilities were unavailable and travel between the United States and China was prevented due to war conditions (R. 5).

The action was heard by the District Court upon cross motions for summary judgment. The District Court dismissed the complaint. The Court refused to toll the statute and held that neither lack of funds, sickness or other factors beyond a person's control prevented the operation of the statute because Congress had not expressly so provided (R. 48). The Court of Appeals affirmed for the same reasons (R. 56).

Reasons for Granting the Writ

1. Petitioner who was born in China on July 16, 1935, of an American father, became an American citizen at birth. 8 U.S.C. 601(g); *Lee Wing Hong* v. *Dulles*, 214 F. 2d 753 (C.A. 7, 1954). His citizenship, however, was subject to defeasance, *Hong* v. *Acheson*, 110 F. Supp. 60 (N.D. Calif. 1953), if he failed to come to the United States at the age of sixteen pursuant to 8 U.S.C. 601(g) or at the age of twenty-three if 8 U.S.C. 1401(a)(7) is applicable. The Courts below found that petitioner's failure to enter the United States prior to his sixteenth birthday, due to factors beyond his control, resulted in loss of citizenship. (R. 48, 56).

(a) The instant case presents to this Court for the first time the construction of Section 201(g) of the Nationality Act of 1940 (8 U.S.C. 601-g) and Section 301 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1401-a-7). Whether these sections authorize the loss of American citizenship by reason of circumstances beyond the control

of a minor child raises an important issue under our citizenship laws.

(b) This issue is not only one of first impression in this Court under the aforementioned sections of the law, but it is also one which will control the disposition of many similar cases. The District Court observed that this was a test case and "one of a number of thousand cases" (R. 36).

2. From the days of our earliest expatriation laws, the cardinal rule of constitutional and statutory construction has been that American citizenship may not be taken away arbitrarily. *MacKenzie* v. *Hare*, 239 U.S. 299 (1915). This doctrine has been applied without qualification to native born citizens, *Acheson* v. *Maenza*, 202 F. 2d 453 (C.A. D.C. 1953); *Alata* v. *Dulles*, 221 F. 2d 52 (C.A.D.C. 1955); to naturalized citizens, *Mendelsohn* v. *Dulles*, 207 F. 2d 37 (C.A.D.C. 1953); and to derivative citizens born abroad, *Perri* v. *Dulles*, 206 F. 2d 586 (C.A. 3, 1953). The decision below, however, refuses to apply this principle to the case of a natural born citizen (8 U.S.C. 601-g; 1401(a)(7)) born abroad. It acknowledges that involuntary conduct can not cause loss of citizenship in the expatriation sections of the Nationality Act of 1940 (8 U.S.C. 801) even though there is no express statutory language requiring voluntary conduct. However, it declines to apply the same doctrine to loss of citizenship under 8 U.S.C. 601 upon the ground that it is not part of the expatriation sections of the statute (R. 60). The District Court states (with the approval of the Court of Appeals) that:

> "Title 8, U.S.C.A. 601, which is the statute applicable under these facts, is clear on its face. It makes no exceptions in circumstances of hardship, nor does it provide for any kind of adjustment in cases where a for-

> eign born citizen, such as the plaintiff, is faced with lack of funds or sickness. It seems that if Congress had wished to make any exceptions, it would have included them in the law which it enacted." (R. 48)

A contrary view, in consonance with the principle that only voluntary conduct shall result in loss of citizenship, is expressed in *Hong* v. *Acheson*, 110 F. Supp. 60 (N.D. Calif. 1953). There the Court held that inability to return to the United States by reason of factors beyond one's control did not expatriate. The Court stated:

> "Subdivision (g) (of 8 U.S.C. 601) in effect confers a citizenship which is subject to defeasance.
>
> . . . . . .
>
> The language of section 201(g) is not sufficiently definite to allow its application as a stop watch. Rights of citizenship are not to be destroyed by an ambiguity, *Perkins* v. *Elg, supra*, 307 U.S. 337, 59 S. Ct. 884, nor should such rights once conferred, be taken away without the clearest sort of justification and proof. *Schneiderman v. United States*, 320 U. S. 118. 122, 63 S. Ct. 1333, 87 L. Ed. 1796. Furthermore a restrictive proviso attached to a statute which provides for the acquisition of citizenship by derivation should be construed in a manner consistent with and ancillary to the paramount purpose of Congress to confer citizenship. *Acheson v. Albert*, 90 U.S. App. D.C. 294, 195 F. 2d 573.
>
> . . . . . .
>
> Section 401(a) of the Nationality Act of 1940 provides for the defeasance of American nationality of a child whose parents have become naturalized in a foreign state unless the child acquires permanent residence in

the United States by the time of attaining the age of twenty-three. Yet, that section has been held not to operate as to extinguish the nationality and citizenship of a person who is diligent in attempting to establish residence in the United States before attaining the specified age, but who is prevented from so doing by circumstances over which he has no control. *Repetto v. Acheson*, D.C.N.C. Cal., 94 F. Supp. 623."

Neither logic, Congressional history, location of the section in the statute, nor rules of statutory construction warrant the distinction made below. If circumstances over which one has no control prevent loss of citizenship of minors and naturalized citizens under expatriation sections of our citizenship laws, they likewise prevent such loss in the instant case.

3. The Courts below were of the opinion that Congress might impose arbitrary conditions upon the retention of citizenship granted by it (R. 48, 60). Citizenship through naturalization represents the grant of citizenship under Congressional limitations. Nevertheless, naturalized citizens may not be deprived of such rights (once granted) by arbitrary conditions such as foreign residence caused by factors beyond their control. *Mendelsohn* v. *Dulles*, 207 F. 2d 37 (C.A.D.C. 1953). Expatriation provisions applying to Americans who remain abroad too long are tolled by war conditions, lack of transportation and the absence of consular facilities. *Perri* v. *Dulles*, 206 F. 2d 586 (C.A. 3, 1935); *Peduzzi* v. *Brownell*, 113 F. Supp. 419 (D.C. Dist. of Col. 1953). A similar doctrine should prevail with regard to minors who acquire American citizenship under 8 U.S.C. 601(g) and are unable to proceed to the United States by reason of factors beyond their control. Otherwise, these minor children are being subjected to an arbitrary change

of citizenship and a "change of citizenship cannot be arbitrarily imposed." *MacKenzie* v. *Hare*, 239 U.S. 299 (1915); *Dos Reis ex rel. Camara* v. *Nicolls*, 161 F. 2d 860 (C.A. 1, 1947); *U. S. ex rel. Baglivo* v. *Day*, 28 F. 2d 44 (S.D.N.Y. 1928); *McCampbell* v. *McCampbell*, 13 F. Supp. 847 (W.D. Ky. 1936); *U.S. ex rel. Fracassi* v. *Karnuth*, 19 F. Supp. 581 (W.D.N.Y. 1937).

4. Subsection (c) of Section 301 of the 1952 Immigration and Nationality Act [8 U.S.C. 1401(c)] provides that subsection (b) which extends the age limitation from sixteen years to twenty-three "shall apply to a person born abroad subsequent to May 24, 1934." A proviso is added that nothing in the subsection shall "alter or affect" the citizenship of one who has complied or is complying with the previous statute (8 U.S.C. 601g) and has already entered the United States. Plainly, the proviso does not affect plaintiff who has not entered the United States. However, the Court below restricts the extension from sixteen to twenty-three years solely to those who have entered the United States (R. 62). This limitation is plainly contrary to the statutory language. Section 301 of the Immigration and Nationality Act (8 U.S.C. 1401-c) by its specific terms grants an extension to their twenty-third birthday to children born abroad subsequent to May 24, 1934, as petitioner was. There is no requirement that they enter the United States prior to their sixteenth birthday in order to secure the benefits of the extension. On the contrary, the extension avoided such requirement. Under its terms, which should be liberally construed in favor of citizenship, *Acheson* v. *Albert*, 195 F. 2d 573 (C.A.D.C. 1952), petitioner's citizenship should not be declared forfeit. The savings clause of the 1952 Act relied upon by the District Court (R. 49) but not by the Court of Appeals, specifically yields wherever it is "otherwise expressly provided in this Act," 8 U.S.C. 1101(c) Note.

The subsection extending the age to twenty-three *expressly* provides that it shall apply, as here, to those born subsequent to May 23, 1934.

Conclusion

The importance of the issue of citizenship presented here, the effect of this test case upon thousands of similar ones, and the conflict the decision below produces with established principles relating to loss of citizenship, are factors which we believe warrant the grant of a writ of certiorari.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT

(Caption—5645)

DECISION.

(Filed Aug. 3, 1955. Dale E. Iblenfeldt, Clerk.)

This matter is before the Court on motions of both parties for summary judgment. The action is brought for a declaratory judgment for citizenship under 8 U.S.C.A. 903, etc. The relief prayed for is: (1) a declaration that the plaintiff is and since birth has been a citizen and national of the United States; (2) directing defendant to issue a certificate of identity to enable plaintiff to obtain transportation to the United States and appear in person to prosecute this action; (3) directing defendant to issue to plaintiff as a citizen a passport or adequate authority to travel to the United States; and (4) redressing the deprivation by defendant of plaintiff's right as a citizen to enter the United States.

The father of the plaintiff was born in the United States but returned to China where he subsequently married. Four children were born of the marriage, the plaintiff being the eldest. Lee You Fee was born on the 16th of July, 1935. The father returned to the United States, and it is alleged that due to war conditions and his financial condition has been unable to return to Hong Kong where the plaintiff now resides. Plaintiff's 16th birthday fell on July 16, 1951. He did not apply for the necessary travel papers to come to the United States until after that date. On December 11, 1951, the plaintiff was formally informed by the American Consulate at Hong Kong that he was no longer a United States citizen and that travel papers would not be issued to him. The basis of that decision was the fact that the plaintiff had not arrived in the United States prior to his 16th birthday as is prescribed by Title 8, U.S.C.A., Section 601, which provides:

"* * * That, if the child has not taken up a residence in the United States or its outlying possessions by the time

he reaches the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease." Plaintiff claims (1) that the passage of his 16th birthday did not defeat his claim to United States citizenship because of the alleged fact that he was unable to arrive in the United States because of circumstances beyond his control, namely, the Second World War, the unsettled conditions in China and Hong Kong, and the inability of his father to raise sufficient funds for his transportation; (2) that the statute in question was tolled by the Second World War because of the fact that the Consulate at Hong Kong was closed for a period of five years and twenty-four days; (3) that a foreign-born citizen cannot be involuntarily deprived of his citizenship; (4) that the Immigration Act of 1952, 8 U.S.C.A. 1401, which designates twenty-three years of age as the cut-off point for loss of citizenship, applies to the plaintiff's situation; and (5) that a determination by the United States Immigration and Naturalization Service that the plaintiff was a citizen of the United States rendered on October 8, 1951, is res adjudicata.

1

Title 8, U.S.C.A. 601, which is the statute applicable under these facts, is clear on its face. It makes no exceptions in circumstances of hardship, nor does it provide for any kind of administrative adjustment in cases where a foreign-born citizen, such as the plaintiff, is faced with lack of funds or sickness. It seems that if Congress had wished to make any exceptions, it would have included them in the law which it enacted. Any exceptions to this statute were for Congress to enact, not for the Court to "interpret."

Plaintiff in his brief cited *Lee Bang Hong* v. *Acheson*, 110 F. Supp. 48, and *Lee Hong* v. *Acheson*, 110 F. Supp. 60, as examples of decisions which held that foreign-born citizens did not lose citizenship through their failure to arrive in the United States by their 16th birthdays. Both of these

cases involve facts which showed that the minors had made timely application for travel papers and that the only reason they did not reach the United States in time to begin their residence was because of unnecessary delay by consulate officials.

2

Plaintiff has been unable to produce authority directly holding that the statute in question should be tolled and the Court has found none. Apparently the issue has never been decided. Plaintiff in his brief cites the *Perri* v. *Dulles*, 206 F. 2d 586, and *Peduzzi* v. *Brownell*, 113 F. Supp. 419, cases which held that Section 191(a) of the Nationality Act of 1942 was tolled during the Second World War. Section 401(a) of that Act provided that one who acquired citizenship abroad through a naturalized parent was required to come to the United States within two years or lose his citizenship. In both of these cases the plaintiffs were unable to return to the United States because the Second World War was being waged during most of that period. It should be noted that the Second World War did not directly interfere with Lee You Fee's coming to the United States before he was sixteen years old. The limitation did not occur during a war as it did in the cases just cited.

The Court feels that the conditions imposed upon foreign-born citizens in order to retain their citizenship is a matter within the discretion of Congress. I find no compelling reason why the statute in question should be tolled.

Plaintiff has not provided any persuasive authority on this contention. Cases relied on by the plaintiff are almost wholly under the Expatriation Act, and thus, clearly not in point under the statute. Had the plaintiff acquired his nationality by birth within the borders of the United States or were he a naturalized citizen, our determination might be otherwise. Plaintiff acquired his citizenship under an Act of Congress. Congress has full authority to place such limitations on that type of citizenship as it sees fit.

4.

The Immigration Act of 1952, 8 U.S.C.A. 1401, states that subsection (b) shall apply to a person born abroad

subsequent to May 24, 1934. Section 405(c) of the same Act provides that the Act shall not terminate nationality heretofore lawfully acquired nor restore nationality heretofore lost under any law of the United States. Therefore, it seems clear that the Act of 1952 will not avail anything for the plaintiff since under the terms of the Act of 1940 his citizenship had lapsed.

5.

The determination of the United States Immigration and Naturalization Service that the plaintiff was a citizen of the United States after the passage of his 16th birthday is not res adjudicata in this action. *In re Wing*, 124 F. Supp. 492, involves these facts: One Thin was originally admitted to the United States as a citizen in 1914. He made several trips back to China, the land of his birth. The fourth time he attempted to enter the United States he was detained for a hearing on alienage. The Court held:

"A prior administrative declaration of citizenship is not res adjudicata on the question of alienage, and if a person seeking entry is found to be an alien he may be excluded even though previously admitted as a citizen."

Plaintiff in his complaint raises a number of constitutional questions. Plaintiff claims that if subsections (g) and (h), 8 U.S.C.A. 601, exclude him from United States citizenship, that to that extent they are unconstitutional. He then proceeds to enumerate four ways in which the Constitution is allegedly violated. In plaintiff's original brief, he covered the Constitutional issues very sketchily. The Court then asked for supplementary briefs specifically on the constitutional issues raised. Plaintiff again avoided discussion of the particular violations alleged on the complaint. We, therefore, deem that the plaintiff has abandoned his claim of the unconstitutionality of 8 U.S.C.A. 601(g) and (h).

"It has been held that where both parties file motions for summary judgment, they concede, for the purpose of determination of their respective motions, that there are no issues of fact. But it has also been said that this does not require the court to determine that no fact issue exists, for it does not necessarily follow that there is no issue of

material fact merely because both move for summary judgment. In reaching its determination, the court may accept all allegations well and sufficiently pleaded as true or at their face value." 10 Nichols Cyc. Fed. Procedure, Sec. 35.22.

Plaintiff has alleged many extenuating circumstances as to why he did not take up residence in the United States before his 16th birthday. Lack of proper financing and troubled world conditions were among the difficulties enumerated. It should be pointed out that plaintiff had access to the Hong Kong Consulate from 1946 to 1951, and yet made no effort to obtain travel papers until after his 16th birthday. I have considered the possibility that there might be an issue of fact involved in this case, because of the plaintiff's alleged inability to leave Hong Kong for the United States. The facts alleged and taken as true in this case present a factual situation much different from the factual situations in *Lee Bang Hong* v. *Acheson, supra,* and *Lee Hong* v. *Acheson, supra.* If the plaintiff were to sustain the claim that lack of proper finances was one of the reasons why he did not take up residence in the United States before his 16th birthday, he still would not be entitled to relief as this Court interprets the law. The issue would be concerning an immaterial fact.

Plaintiff's motion for summary judgment is denied. The motion of the defendant for summary judgment is granted. Defendant's counsel will prepare order for judgment, submitting it to plaintiff's counsel for approval as to form only.

Dated, Milwaukee, Wisconsin, this 3rd day of August, 1955.

K. P. Grubb,
U. S. District Judge.

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, SEPTEMBER TERM AND SESSION, 1956

No. 11639

LEE YOU FEE, by LEE Q. PON, his next friend,
Plaintiff-Appellant,

v.

JOHN FOSTER DULLES, as Secretary of State,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Wisconsin.

September 26, 1956

Before DUFFY, *Chief Judge*, MAJOR and SWAIM, *Circuit Judges.*

SWAIM, *Circuit Judge.* The plaintiff, Lee You Fee, by his next friend, Lee Q. Pon, his father, brought this action against the Secretary of State of the United States for a judgment declaring that the plaintiff is now and has been since birth a citizen and national of the United States, and directing the defendant to issue to the plaintiff a certificate of identity and other necessary papers which would constitute authorization to the plaintiff to travel and obtain transportation to the United States to enable plaintiff to present himself at an official port of entry of the United States to apply for entry therein.

The facts in this case are not disputed. Plaintiff was born in China on July 16, 1935, of a Chinese mother and a father who was a citizen of the United States. Plaintiff's father has been a permanent resident of the United States since 1926 and since 1936 has had his permanent residence in Milwaukee, Wisconsin. Plaintiff's grandfather was born in the United States. Plaintiff's father was born in China but came to the United States as a youth. He later visited in China where he was married to plaintiff's mother. In 1936 plaintiff's father returned to the United

States and during that year the plaintiff was taken by his mother from the province in China where he was born to the British Crown Colony of Hong Kong where he has since resided. On March 3, 1945, plaintiff's mother died and plaintiff thereafter was under the care of relatives of his mother.

The plaintiff insists that he and his father have made diligent efforts to bring plaintiff to the United States prior to his sixteenth birthday but that plaintiff was prevented from so coming to the United States by circumstances beyond his control. Those circumstances were that during World War II conditions were unsettled in China and in Hong Kong, and that neither the plaintiff nor his father could raise sufficient funds for plaintiff's transportation to the United States.

The District Court found that plaintiff's sixteenth birthday fell on July 16, 1951; that prior to that time plaintiff had not made application for the necessary travel papers to come to the United States; and that thereafter the American Consulate at Hong Kong formally informed the plaintiff that he was no longer a citizen of the United States due to the fact that plaintiff had not come to the United States prior to his sixteenth birthday as required by 8 U.S.C.A. § 601 (1942 ed.). Section 601 provides:

"The following shall be nationals and citizens of the United States at birth:

* * * * * *

"(g) A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States * * the other being an alien: *Provided*, That in order to retain such citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years: *Provided further*, That, if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years * * * his American citizenship shall thereupon cease.

* * * * * *

"(h) The foregoing provisions of subsection (g) concerning retention of citizenship shall apply to a child born abroad subsequent to May 24, 1934." 8 U.S.C.A. § 601.

The Constitution confers citizenship only upon "persons born or naturalized in the United States and subject to the jurisdiction thereof." Amendment XIV, Section 1. Clearly the plaintiff cannot claim citizenship under this provision of the Constitution. Plaintiff must therefore rely only on the provisions of such Acts as the Congress has passed under the authority of the Constitution.

As shown above, the Nationality Act of 1940 granted citizenship at birth to a child born in a foreign country to parents one of whom was a citizen of the United States, with certain residence requirements, and the other an alien. But this grant of citizenship was clearly made subject to the conditions subsequent that a person so born, to retain citizenship, "must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years" and, further, that "if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years • • • his American citizenship shall thereupon cease."

The Constitution of the United States, in Article I, Section 8, confers on the Congress the power to establish a uniform rule of naturalization. So long as the rule so established is uniform Congress may provide such conditions as it sees fit. In *United States v. Wong Kim Ark*, 169 U.S. 649, 668, the Court said:

> "Nor can it be doubted that it is the inherent right of every independent nation to determine for itself, and according to its own constitution and laws, what classes of persons shall be entitled to its citizenship.
>
> "Both in England and in the United States, indeed, statutes had been passed at various times enacting that certain issue born abroad of English subjects, or of American citizens, respectively, should inherit, to some extent at least, the rights of their parents."

In the instant case the plaintiff was granted American citizenship at birth subject to the provision of the law that citizenship would be lost by his failure to comply with the stipulated conditions. The plaintiff did fail to comply with these conditions and pursuant to the law he ceased to be a citizen of the United States.

As the trial judge pointed out, the 1940 statute, 8 U.S.C.A. § 601, made no exception, based on circumstances of hardship, to the requirement that a person, in a situation such as the plaintiff, in order to retain his citizenship was required to take up residence in the United States or its outlying possessions by the time he reached the age of sixteen years.

The plaintiff has cited two District Court decisions, *Lee Bang Hong* v. *Acheson*, 110 F. Supp. 48, and *Lee Hong* v. *Acheson*, 110 F. Supp. 60, and a decision of this court, *Lee Wing Hong* v. *Dulles*, 7 Cir., 214 F. 2d 753, as supporting his contention that his citizenship was not lost by his failure to establish residence in the United States prior to his sixteenth birthday. But in each of those cases the plaintiff had made timely application and in each case the plaintiff's failure to reach the United States prior to his sixteenth birthday was due to the tardiness and unnecessary delay by officials of the consular office in issuing to the plaintiff the necessary travel orders. Certainly the Government should not be heard to contend that a plaintiff had been deprived of his citizenship because of the failure of the plaintiff to do something which the officials of the Government had carelessly or wilfully prevented his doing. In the instant case the plaintiff did not make any application to come to the United States until after his citizenship had been lost because of his failure to comply with the condition that he establish his residence in the United States prior to his sixteenth birthday.

The plaintiff herein also insists that "Subsections (g) and (h) of section 201 of the 1940 Nationality Act (8 U.S.C.A. 601 (g) and (h)) are part and parcel of the expatriation provisions of such Act which also included section 400 to 410 thereof. Sections 400 to 410 of the 1940 Nationality Act, 8 U.S.C.A. §§ 800 to 810, deal only with expatriation.

These sections recognize the right of expatriation as a natural and inherent right of all people; define how a person who is a citizen of the United States by birth or naturalization shall lose his nationality; define certain actions of the citizen which shall constitute a presumption of expatriation; and define how such presumption of expatriation may be overcome by furnishng satisfactory evidence. Section 403 of the Act provides that no national under eighteen years of age can expatriate himself by performing some of the acts which Section 401 provides shall be expatriating acts if performed by a person who is eighteen years of age or over. The plaintiff here argues that since some of the expatriation cases hold that a citizen may not be expatriated unless he voluntarily performs the acts of expatriation and that a minor's act is not a voluntary act in the sense required to effect his expatriation the same rules should be followed in the instant case in determining whether or not the plaintiff has lost his citizenship.

However, as we have pointed out above, the sections of the Nationality Act on the two subjects, expatriation and acquiring citizenship at birth in a foreign country where only one of the parents is a United States citizen, are entirely different. The expatriation part of the Act describes what voluntary acts on the part of a citizen shall constitute renunciation of his citizenship, while that part of the Act upon which the plaintiff depends grants citizenship to a foreign born person subject to the provision that his citizenship may be retained only on the condition that he take up residence in the United States by the time he reaches the age of sixteen years and that if he fails to do so his citizenship shall thereupon cease. The Congress need not have made and did not make any exceptions to this condition.

The plaintiff also relies strongly on subsection (b) of Section 301 of the Immigration and Nationality Act of 1952; 8 U.S.C.A. § 1401, *et seq.*, as operating to restore his citizenship. Subsection (a)(7) of Section 301 states: "a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United

States * * *" shall be a national and a citizen of the United States at birth. But subsection (b) of this same section provides that:

> "Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a) of this section, shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United States for at least five years: *Provided*, That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years." 8 U.S.C.A. § 1401(b).

Section 405(c) of the Immigration and Nationality Act of 1952 provides that:

> "Except as otherwise specifically provided in this Act, the repeal of any statute by this Act shall not terminate nationality heretofore lawfully acquired nor restore nationality heretofore lost under any law of the United States or any treaty to which the United States may have been a party."

The 1952 Act in Section 353(10) did specifically provide that subsections (b) and (c) of Section 404 of the Nationality Act of 1940 should not be held to be or to have been applicable to persons who had, by an Act of Congress or by treaty, United States nationality solely by reason of former nationality and birth or residence in an area outside the continental United States. Section 354(1) of the Nationality Act, as amended in 1952, also provides that Section 404(c) of the Nationality Act of 1940 should not be held to be or to have been applicable to veterans of World War II. 8 U.S.C.A. § 1486(1).

The plaintiff insists that subsection (b) of Section 301 of the Nationality Act of 1940, as amended in 1952, operated to restore his citizenship. This subsection only provides that a person who is a national and citizen of the United

States at birth under paragraph 7 of Section 301 shall lose his citizenship unless he complies with certain requirements of residence in the United States.

Subsection (c) of Section 301 of the 1952 Nationality Act, 8 U.S.C.A. § 1401(c), provides that:

> "Subsection (b) of this section shall apply to a person born abroad subsequent to May 24, 1934: *Provided, however,* That nothing contained in this subsection shall be construed to alter or affect the citizenship of any person born abroad subsequent to May 24, 1934, who, prior to the effective date of this chapter, has taken up a residence in the United States before attaining the age of sixteen years, and thereafter, whether before or after the effective date of this chapter, complies or shall comply with the residence requirements for retention of citizenship specified in subsections (g) and (h) of section 201 of the Nationality Act of 1940, as amended."

It would seem clear that this language cannot properly be construed to restore plainiff's citizenship which had been lost prior to the effective date of the 1952 Act because of plaintiff's failure to comply with the condition that in order to retain his citizenship he was required to come to the United States prior to his sixteenth birthday. Subsection (c) offers to a person who was born abroad subsequent to May 24, 1934, and *who, prior to the effective date of the 1952 Nationality Act, had taken up residence in the United States before attaining the age of sixteen years,* the choice of thereafter complying with the residence requirements for the retention of citizenship as specified in subsections (g) and (h) of Section 201 of the 1940 Nationality Act, as amended.

The judgment of the District Court is affirmed.

JUDGMENT

(September 26, 1956)

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Wisconsin, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED.

(2934-8)